(11)

No 852

IN THE

SUPREME COURT OF THE UNITED STATES

AMERICAN MANUFACTURING COMPANY
OF TEXAS
W. J. GOURLEY, and
W. H. THOMPSON *Petitioners*

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

PETITION FOR REVIEW ON WRIT OF CERTIORARI OF A DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CASES AND AUTHORITIES

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American Manufacturing Company of Texas, a corporation, W. J. Gourley and W. H. Thompson, hereby petition this Honorable Supreme Court of the United States to review on writ of certiorari a decision of the Honorable Circuit Court of Appeals for the Fifth Circuit at New Orleans, and would show:

1.

STATEMENT OF THE MATTER INVOLVED

In an opinion filed January 13th, 1943, and by decree entered February 15th, 1943, the Circuit Court of Appeals for the Fifth Circuit, holding that these petitioners had disobeyed its decree entered on December 9th, 1938, adjudged petitioners guilty of con-

tempt. This contempt proceeding had been initiated by a Petition For a Rule to Show Cause filed by the National Labor Relations Board in November, 1942; and such Rule to Show Cause had issued requiring American Manufacturing Company of Texas, W. J. Gourley and W. H. Thompson to answer by admission, denial, or affirmative defense every allegation of the Labor Board's Petition. These proceedings being for Civil contempt, your petitioners herein, did, in conformance with the Rule issued, file an answer to the charge of the Labor Board. This matter was considered by the Circuit Court upon the petition for the Rule, and the verified answer thereto, without the hearing of any additional evidence. Thereby the allegations of the Petition for Rule which were admitted by the answer (and only the allegations which were admitted) together with the affirmative allegations of the answer became the record of fact and evidence in the case.

It appeared from these facts, as so established and fixed by the pleadings:

> That in 1937 and 1938 American Manufacturing Company of Texas (a petitioner herein) being then engaged in the manufacture of oil field equipment on a small scale, employing about 250 men, had a Labor Board controversy which was terminated by the entering of a consent decree on December 9th, 1938, in cause No. 8964 entitled National Labor Relations Board v. American Manufacturing Company, Inc. in the Circuit Court of Appeals for the Fifth Circuit. (Tr. 24-25.)

That the sole and only Labor Act violations at issue in such labor case were—First, that American Manufacturing Company had assisted and dominated a company union known as Employees' Federation of American Manufacturing Company, and, Second, that an employee named Gutoski had been discriminated against and fired. (Tr. 24, 37-44.)

That the intermediate report of the Trial Examiner, the order of the National Labor Relations Board and the Circuit Court enforcing Decree (dated December 9th, 1938) dealt specifically and affirmatively with these two violations. (Tr. 37-44.)

That the Decree of December 9th, 1938, in addition to its requirements (by cease and and desist orders and by affirmative injunctions) with reference to the Employees' Federation and with reference to Gutoski matter, included a general cease and desist order embodying the content of Section 8 (1) of the Wagner Act: and it is this latter general cease and desist order only which is alleged to have been violated in this contempt action. (Tr. 4, 10-13.)

That American immediately complied with all requirements of the Decree of December 9th, 1938, reinstating Gutoski, refusing to recognize Employees' Federation, and posting the notices required. (Tr. 26.)

That no improper labor actions were charged

to American from December 9th, 1938, until June, 1942.

That in the interim American converted its plant from peace time private industry to war time industry, and in June of 1942 and for several months theretofore, American was engaged almost 100% in the manufacture of shells for the Army and Navy. (Tr. 25.)

That its volume of purchases and business was 1200% greater in June, 1942, than in 1938. (Tr. 25.)

That in June, 1942, the plant was operating under war time regulations, being fenced and guarded night and day, and with every precaution being taken to insure secrecy as to its endeavors, and to insure maximum efficiency of its working personnel. (Tr. 25.)

That in June, 1942, and for many months theretofore American had a constant demand for employees, particularly skilled machinists, and was employing any and every capable man it could locate, regardless of union affiliations and beliefs. (Tr. 26.)

That in June, 1942, it was employing members of the Union in responsible positions, and its plant was operating efficiently and without any labor difficulties. (Tr. 27.)

That it had not in June, 1942, or at any time before or after, discriminated against or threatened to discriminate against any employee because of his union affiliations or views. (Tr. 30.)

That American's foremen and men in charge of its operations had not discriminated against any employee by threat of intimidation or otherwise because of any union affiliations or beliefs. (Tr. 34-36, 45-46.)

That in June, 1942, American posted or issued three notices urging its employees to stay on the job and advising that they did not have to pay money to any organization as a pre-requisite to working for American. (Tr. 3, 4, 5, 15.)

That these notices were not connected with, related to, or in any manner similar to any of the acts and practices involved in the 1938 Labor case. (The Labor Board Petition does not even allege relationship or similarity. (Tr. 1-7.))

That neither said notices nor any of the surrounding conditions and circumstances at American carried any threat to the employees that they would be penalized or discriminated against because of union beliefs and affiliations. (Tr. 30.)

That under prevailing conditions as to the demands for labor, it was impossible for any employee to have been intimidated or to have been in any way interfered with, restrained or coerced with reference to his right to self-organize, etc. (Tr. 30.)

Although the above facts were undisputed in the record, the Circuit Court held that the June notices were contempuous without regard to whether the same were connected with, related to or were similar to the

acts and practices that the Decree of December 9th, 1938, sought to remedy. The Court further held that it wouldn't make any difference whether the notices actually interfered with or restrained the employees, the Court saying that the notices had the purpose of interfering with and restraining the employees. (Tr. 62-66.)

The opinion of Court stated that a decree requiring respondents to take appropriate action to purge themselves of contempt by disavowing prior conduct and statements, and by assuring against further violations be presented. Thereafter, on February 15th, 1943, the Circuit Court entered a decree ordering respondents to purge themselves of contempt by distributing and posting a prescribed notice and by paying costs, including the cost of printing of the Labor Board's petition and brief. (Tr. 73.)

2.

STATEMENT AS TO JURISDICTION

This Honorable Court has the jurisdiction to grant this petition under the provisions of the Act of February 25th, 1925, Chap. 229, 43 Stat. 936, and particularly under Section 240 (a) of said Act, being also Section 240 (a) of the Judicial Code.

The following reasons justify the granting of this petition under the applicable rules of this Court:

(a) The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way possibly in conflict with the following applicable decisions of this Court:

N. L. R. B. v. Express Publishing Company, 321 U. S. 426, wherein this Court held that the National Labor Relations Act did not give the Circuit Courts the power to control by contempt, alleged violations of the Act which were not in controversy at the time of the enforcement decree and which were not similar or related to the unfair labor practices which the Board had theretofore found.

N. L. R. B. v. Virginia Electric & Power Company, 314 U. S. 469, wherein this Court held that interference, restraint or coercion of employees in their right to self organize, etc., is not established by proof of isolated utterances, separated from their background and from the surrounding circumstances.

Gompers v. Buck Stove, 221 U. S. 418, wherein this Court held that in a Civil contempt proceeding involving acts already committed, the only power of the Federal Court was to punish by a remedial fine commensurate with damages sustained by the adversary.

(b) Such decision is in conflict with the following decisions of another Circuit Court on the same matter:

N. L. R. B. v. Pacific Greyhound (9th), 106 F. (2d) 867, wherein it was held that a lapse of two years had an important bearing on the question of the existence of contemptuous conduct.

(c) Whether or not a Circuit Court having entered an enforcing decree in a Labor case should by contempt proceedings control future alleged violations of the Labor Act which are not connected with, related to or similar to the acts and practices which were involved in the original enforcement case, is an important question of Federal law having to do with the administration of the National Labor Relations Act, and such question should be settled by this Court.

Whether a Circuit Court in a contempt proceeding arising out of a Labor case can impose as a condition of purge for consummated contemptuous acts, punishments other than a remedial fine, is an important Federal question which should be settled by this Court.

(d) Under the accepted and usual course of Judicial proceedings, punishment for contempt of Court is considered a harsh remedy and it is required that the contemptuous act be established by clear and preponderating evidence and not by inference; and the Circuit Court of Appeals has departed from such accepted and usual course in this immediate case.

3.

QUESTIONS PRESENTED

First:—Where the National Labor Relations Board in 1938 found a specific violation of Section 8 (2) and Section 8 (3) of the National Labor Relations Act which entailed a finding of a technical violation of Section 8 (1), and where the enforcing decree of the Circuit Court of Appeals entered on December 9th, 1938, in addition to its provisions which affirmatively dealt with the violations of Section 8 (2) and Section 8 (3), included a general cease and desist order embodying the content of Section 8 (1); did such Circuit Court err in holding that notices posted and delivered 3½ years later, which had no connection with, relation to or similarity to unfair practices found in the original case, were in contempt of that portion of its prior decree which embodied Section 8 (1).

Second:—There being no facts in the record of undisputed evidence in this case showing the background under which the June notices were issued, and there being no facts in the record showing that such notices in any manner interfered with, restrained or coerced the employees in their right to self-organize, etc., but such facts showing to the contrary that there was and could have been no threat of restraint of, intimidation of or interference with the employees thereby; did the Circuit Court of Appeals for the Fifth Circuit err in holding that such notices had the purpose of interfering with, restraining or coercing the employees and that the notices were contemptuous.

Third:—Inasmuch as the nature of the punishment for contempt of a Circuit Court is prescribed by Statute (Section 268, Judicial Code, 28 U. S. C. A. 385); did the Circuit Court err in setting up as the condition for the purging of contempt, the performance of acts beyond what it had the power to impose as an actual punishment?

Fourth:—The Petition for the Rule to Show Cause was directed to American Manufacturing Company and "its officers and agents including particularly W. J. Gourley, its President, and W. H. Thompson". The petition did not set out any specific acts of the two individuals so particularly named but attributed the issuance of notices to respondents. A joint answer was filed by the company and the two named individuals as respondents. This answer denied that W. H. Thompson had any charge or control of the company operations and set out that he was not an officer or director of the company. The decree of December 9th, 1938, was against American Manufacturing Company only. On the basis of the record in this immediate case, and in the absence of a showing of the extent and manner in which these individuals participated in the alleged contemptuous acts, did the Circuit Court of Appeals for the Fifth Circuit err in adjudging the individuals, particularly Thompson, guilty of contempt.

4.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

First:—The very situation which this Court in anticipation sought to prevent and avoid by its ruling in the *Express Publishing Company* case, has occurred in this immediate case. The ruling of the Circuit Court in the immediate case is directly contrary to the ruling in the *Express Publishing Company* case. The irreconcilable conflict can best be demonstrated by quotations from the opinion in the Supreme Court case and we beg the indulgence of the Court in quoting therefrom at this point. In the *Express Publishing Company* case there had been a violation of Section 8 (5) of the National Labor Relations Act, and the Labor Board argued that the Company should in addition to the remedies relating to such violation, be also restrained from committing any acts which might be a violation of Section 8 (1). The Court said:

> "Yet if the contention which it (the Board) makes is to be sustained, subsequent violations of Section 8 (2) and Section 8 (3) which are also violations of Section 8 (1) may be the subject of a contempt order merely because respondent by the refusal to bargain has violated Section 8 (5) which is similarly a violation of Section 8 (1)."

At another point the Court said:

> "It is obvious that the order of the Board which when judicially confirmed, the Court may be called on to enforce by contempt proceedings, must like the injunction order of a Court, state with rea-

> sonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

And the Court further said:

> "In the light of these provisions we think that Congress did not contemplate that Court should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy, and not found by the Board and which are not similar or related to the unfair labor practice which the Board has found."

In the dissenting opinion Justice Douglas pointed out that the Publishing Company had not complained of the injunctive order embodying Section 8 (1) of the Labor Act and he questioned the right of the Supreme Court to consider such question. This dissenting opinion emphasizes the holding of the majority of the Court that the entering of a general restraint embodying the provisions of Section 8 (1) was beyond the authority of the Board and of the Court by enforcing decree.

In the American Manufacturing labor case which was determined in 1938, violations were found of Section 8 (2) and Section 8 (3) of the Labor Act. In answer to the contempt proceedings initiated in November of 1942, respondents therein (your petitioners) showed that there was no relationship or similarity

between the unfair labor practices found by the Board back in 1938 and the practices alleged to have occurred in June, 1942, and they argued that the cease and desist order of the 1938 decree which embodied Section 8 (1) of the Labor Act was not sufficiently specific to advise them what they were to refrain from doing. The Circuit Court, without discussion and without citation of authority, rejected and brushed aside this defense. Said Court thereby took direct issue with the ruling of this Honorable Supreme Court in the Express Publishing Company case.

Second:—Your petitioners, as respondents, in the contempt proceedings in the Circuit Court urged that the three June notices in themselves did not sufficiently prove interference, restraint and coercion, so as to sustain an adjudgement of contempt. The Circuit Court, again without citation of authority, rejected and brushed aside such contention. The Circuit Court said it was not necessary for there to have been a restraint, but that it was sufficient if the notices were issued for the purpose of interfering, restraining or coercing. Under this ruling, any utterance which any agent of American Manufacturing Company might make at any time in the future, could be similarly classified by the Circuit Court as having the purpose of interfering with, restraining and coercing. We submit that this is a dangerous ruling and is an unauthorized restriction on the right of free speech. In the Virginia Electric & Power case this Court refused to confirm a Labor Board finding of interference and restraint, which showed to have been based on utterances separated from their background.

Third:—Section 268 of the Judicial Code prescribes that punishment for contempt shall be by fine or imprisonment. The Gompers case clearly holds that in a Civil contempt action wherein past acts, as distinguished from continuing violations, are involved, the only punishment which a Court can assess is a fine of a remedial nature. In the immediate case the Circuit Court has found that the three notices issued in June, 1942, violated the Court's cease and desist order. No continuing violation was before the Court. With reference to the alleged violations charged to American's foremen, the charges were refuted by the answer and the Circuit Court did not find any violation. It is apparent that the only punishment which the Circuit Court can assess in this case is a fine commensurate with the damages sustained by the Labor Board, which would be the cost of printing its brief and answer. The present disposition of this case by the Circuit Court therefore raises a very important question. The said Court as a condition for the purge of contempt states that these petitioners (as respondents) shall post and distribute a prescribed notice advising the employees at American that they will not in the future molest or influence the employees, etc. Said notice also contains a statement that certain instructions have been issued to the supervisors and foremen. This in spite of the fact that the Circuit Court did not (and could not on the basis of the record) find that any foreman had acted in violation of the Court's original decree. The vacation of an adjudgment of contempt through the fulfillment of prescribed conditions of purge, is a subject which has been scantily touched

upon and never developed by the Federal Courts. Whether a Federal Court can say to the person whom it has found to have violated its decree, that it will excuse the contempt if he does thus and so, is a question which we have not found answered. The case *Re: Farkas*, 204 Fed. 343, states that an opportunity for purge should be given before any fine is imposed. However, we have found no treatise on the subject of purge by any Federal Court in particular connection with the Court's jurisdiction as limited by Section 268 of the Judicial Code. But if we can assume that the Court has the right to prescribe a method of purge, then is it within the authority of the Court, or is it a reasonable exercise of such authority, for the Court to prescribe a method of purge which is more severe than the punishment which the Court can impose? The Circuit Court in the immediate case requires, as a condition of purge, that assurances be given against future violations of its decree, even though the record does not show any continuing violations, and even though the Labor Board's petition for contempt does not charge that future violations impend. The Circuit Court requires, as a condition of purge, that the foremen be given instructions (or rather the Court requires that employees be notified that the foremen have been instructed) even though no transgressive acts of the foremen were found to have occurred. Can a Circuit Court insist that these petitioners in order to purge themselves of contempt and have the adjudgment of contempt vacated, perform acts which have no connection with the violations that the Court found. Clarification of the authority and jurisdiction of the Circuit

Courts to prescribe conditions of purge and of the limits of such authority in these labor cases is urgently needed at this time.

Fourth:—It is a general principle of law that contemptuous conduct must be shown by clear and preponderating evidence. The decree of December 9th, 1938, was against American Manufacturing Company only. Being a corporation, the decree necessarily applied to its officers and responsible agents. The Labor Board's Petition for a Rule in the immediate case named Gourley and Thompson as respondents, and thereafter by use of the inclusive term "Respondents" ascribed the issuance of notices to "Respondents." Thompson is not shown to have had any special connection with any of the notices. Thompson was not in charge or control of any of the Company's activities. We seriously question whether the Labor Board has sustained the burden of proof by showing that Thompson, merely because he was an employee of American, had so conducted himself to be in contempt of the Court's original order against the Company. There is no basis for the ruling of the Circuit Court that W. H. Thompson, as an indiivdual, violated its decree and that he was in contempt of court.

WHEREFORE, petitioners, individually and together, pray that this petition be granted and that this Honorable Court review on writ of certiorari, said decision of the said Circuit Court of Appeals for the Fifth Circuit, and that the decision of said Circuit Court of Appeals adjudging these petitioners in contempt, be reversed, and petitioners pray for such other and further relief as they may be entitled to.

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BRIEF IN SUPPORT OF PETITION FOR REVIEW ON WRIT OF CERTIORARI

I.

INDEX and TABLE OF CASES—(See Index and Table at beginning of petition.)

II.

THE OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT OF WHICH REVIEW IS SOUGHT, IS REPORTED IN 132 F. (2d) 740.

III.

STATEMENT OF JURISDICTION (See statement as to jurisdiction in foregoing petition.)

IV.

STATEMENT OF CASE (See STATEMENT OF THE MATTER INVOLVED in foregoing petition.)

V.

SPECIFICATION OF ERROR—(In the foregoing petition under the caption QUESTIONS PRESENTED, the Errors of the Circuit Court of Appeals are set out. These errors as reflected by such questions presented are hereby assigned as errors in this brief.)

VI.

ARGUMENT—THE FOLLOWING STATEMENTS AND CONTENTIONS CONTAINED IN THE FOREGOING PETITION ARE SUPPORTED BY AUTHORITIES AS SHOWN:

(1)—THAT THIS PROCEEDING IS FOR CIVIL CONTEMPT—

N. L. R. B. v. Whittier Mills, 122 F. (2d) 725 (5th);

N. L. R. B. v. Hopwood Rettining Co., 102 F. (2d) 302 (2nd);

N. L. R. B. v. Carlisle Lumber Company, 108 F. (2d) 188 (9th);

Gompers v. Buck Stove Company, 221 U. S. 418.

Examination as to the manner in which this case was styled in the Circuit Court and of the procedure followed whereby these petitioners (as respondents) were required to answer the allegations of the Labor Board petition, demonstrate that this is a civil contempt proceeding.

(2)—THAT THE ADMITTED PARTS OF THE PETITION ARE CONSIDERED AS TRUE, AND THAT AS TO THOSE DENIED, THE ALLEGATIONS OF THE ANSWER ARE TAKEN AS TRUE:

Waterman S. S. Corporation, v N. L. R. B., 119 F. (2d) 760 (5th).

(3)—THAT CONTEMPTUOUS CONDUCT SHOULD BE ESTABLISHED BY CLEAR AND PREPONDERATING EVIDENCE:

City of Campbell v. Arkansas-Missouri Power Co., 65 F. (2d) 425 (8th);
17 *C. J. S.* page 110.

(4)—THAT A CIRCUIT COURT IS WITHOUT AUTHORITY TO PUNISH AS CONTEMPTUOUS, ALLEGED UNLAWFUL PRACTICES WHICH WERE NOT RELATED TO OR SIMILAR TO THE PRACTICES WHICH ITS PRIOR DECREE SOUGHT TO REMEDY:

N. L. R. B. v. Express Publishing Company, 321 U. S. 426.

This case has been discussed and quoted from in the foregoing petition and it is unnecessary to present additional extensive argument here. We wish merely to say that unless the general cease and desist order (embodying the contents of Section 8 (1) of the Labor Act) which was included in the decree of December 9th, 1938, and which is alleged to have been violated by the June, 1942, notices, is construed, interpreted and given meaning in the light of the actual practices which had taken place in 1937 and 38, then there was no way for these petitioners to have known what they were restrained from doing thereby, and there is no way in the future for these petitioners to know what they are restrained from doing. The Express Publishing Company decision recognized this situation. It further recognized that the power of the Circuit Court

to punish by contempt alleged violations of the Labor Act was necessarily limited to violations which were related and similar to the violations which it had enforced. Any other interpretation of the Labor Act would face the Circuit Courts with unending contempt actions and would require citizens to operate under a threat of punishment for contempt for acts which they could not know they had been enjoined from doing.

(5)—THAT PASSAGE OF TIME AND CHANGE IN CONDITIONS MUST BE CONSIDERED IN DETERMINING WHETHER THERE HAS BEEN A CONTEMPT OF COURT:

N. L. R. B. v. Pacific Greyhound, 106 F. (2d) 867 (9th);
City of Campbell v. Arkansas-Missouri Power, 65 F. (2d) 425 (8th);
Cohen v. U. S., 295 Fed. 633 (6th);
Home Investors v. Ioveno, 141 N. E. 78 (Mass.)

(6)—THAT THERE MUST BE A CONSIDERATION OF THE TOTALITY OF THE EMPLOYER'S ACTIVITIES, RATHER THAN A CONSIDERATION OF ISOLATED UTTERANCES SEPARATED FROM THEIR BACKGROUND, IN ORDER TO SUSTAIN A FINDING OF INTERFERENCE, RESTRAINT AND COERCION UNDER THE LABOR ACT:

N. L. R. B. v. Virginia Electric & Power, 314 U. S. 469.

In the Virginia Electric & Power case this Honorable Court held that the Board's finding as to interference, restraint and coercion could not be sustained because the Board was not shown to have considered the totality of the Company's activities, and because this Court couldn't determine whether the Board had considered the complex of the activities of the Company. This Court refused to hold that the isolated utterances in themselves constituted an interference. And this was an original labor case and not a contempt case. It would seem that in a contempt case the evidence would have to be even more conclusive as to the existence of an actual interference, restraint or coercion. The Circuit Court, in the immediate case, however, far from requiring a showing of interference, restraint and coercion by competent proof of the totality of the Company's activities, held that it was unnecessary to make any proof of interference, restraint or coercion. The Court said that it was sufficient that the notices had the purpose of interfering, etc. The finding of such a purpose was clearly by inference since no facts in the record evidenced such purpose. We submit that the ruling in the immediate case is entirely without precedent and that if a person can be punished for contempt, not because he violated a Court's decree but solely because the Court says he had the purpose of violating the decree, then such person is without any definite criterion as to future conduct.

(7)—THAT INASMUCH AS THE CIRCUIT COURT COULD PUNISH THE CONTEMPTUOUS PAST CONDUCT IN THIS CASE BY A FINE ONLY, IT WAS WITHOUT AUTHORITY TO IMPOSE AS A CONDITION OF PURGE, PERFORMANCE OF ACTS BEYOND ITS POWER TO ASSESS AS PUNISHMENT:

Section 268, Judicial Code, 28 U. S. C. A. 385;
Gompers v. Buck Stove Company, 221 U. S. 418;
Parker v. U. S., 126 F. (2d) 370;
Nordstrom v. Wahl, 41 F. (2d) 910.

This is a Civil contempt action. The alleged violations had already occurred. No question of continuing violations was before the Circuit Court. It is clear that the only punishment which the Circuit Court can assess in this case is the imposition of a fine commensurate with the expenses incurred by the Labor Board. This being true, did the Court have the power to prescribe conditions under which these petitioners might purge themselves of contempt? And if the Court had such power, could it prescribe conditions which had nothing whatever to do with the contemptuous conduct as found by the Court, and which conditions are beyond what the Court could impose as punishment for the contempt itself? There being no continuing violation of the Court's 1938 decree, was it within the power of the Court to fix, as a condition of purge, that these petitioners give assurance as to their future conduct? The Court not having found that the actions of the foremen were contemptuous, could the Court fix as

a condition of purge that these petitioners advise American's employees that the foremen had been given certain instructions?

(8)—THAT W. J. GOURLEY AND W. H. THOMPSON INDIVIDUALLY WERE NOT GUILTY OF ANY CONTEMPTUOUS ACTS:

Cases in which individual officers or agents of a corporation have been held in contempt of an injunction issued against the corporation itself, were cases where the individual was the alter ego of the corporation or where the individual had engaged in positive conduct contrary to the terms of the injunction. In the case of W. H. Thompson, there is no allegation in the Labor Board's petition showing any positive acts on his part in violation of a decree. Thompson was not an officer of American and was not in charge of its activities. One of the June notices was signed by The Management. The second was signed by Mr. Gourley, and there is no showing as to how the third was signed. Upon what facts the Circuit Court has predicated its finding of guilt as to Thompson individually, we cannot say. The Court's opinion does not show. We only know that if the showing made in this case was sufficient to hold Thompson in contempt, then any agent of American can similarly be held in contempt.

WHEREFORE, petitioners pray that the petition for review on writ of certiorari be granted, and that the recision of the Circuit Court be reversed, and they pray for such other relief as they may be entitled to.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 852

AMERICAN MANUFACTURING COMPANY OF TEXAS, W. J. GOURLEY, AND W. H. THOMPSON, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals on the present contempt application (R. 58–62) is reported in 132 F. (2d) 740. The decree of the circuit court of appeals in the preceding enforcement proceeding was entered upon consent of the parties (R. 10–14) and without opinion. The decision of the National Labor Relations Board upon which the enforcement proceeding was based is reported in 7 N. L.R. B. 375.

JURISDICTION

The decree of the circuit court of appeals (R. 68–70) was entered on February 15, 1943. The petition for a writ of certiorari was filed on March 25, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the acts held to be in contempt of a consent decree entered in 1938 were related to or similar to the unfair labor practices on which the consent decree was based.

2. Whether the posting of notices by the employer, which disparaged the union and the advantages of membership in it, together with refusal to remove one such notice upon request to do so by two employees, can be regarded as in contempt of a decree enforcing an order of the Board.

3. Whether the court below properly required petitioners, as the condition upon which they could purge themselves of contempt, to post in their plant and distribute to their employees appropriate notices disavowing their prior contemptuous notices and assuring against further violation of the decree.

4. Whether the president of the company and the assistant to the president committed acts in contempt of the decree.

5. Whether lapse of time diminishes the force of a consent decree enforcing an order of the Board.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*) are set forth in the Appendix, *infra,* pp. 22–23.

STATEMENT

On May 23, 1938, the Board, in a proceeding initiated by charges filed by a local of the International Association of Machinists, issued its decision and order (7 N. L. R. B. 375) finding that American Manufacturing Co., Inc.,[1] had interfered with, restrained, and coerced its employees in violation of Section 8 (1) of the Act, sponsored Employees' Federation of the American Manufacturing Company of Texas in violation of Section 8 (2) of the Act, and discharged an employee, Gutoski, in violation of Section 8 (3) of the Act. The Board ordered the company and its officers, agents, successors, and assigns to cease and desist from such unfair labor practices, to offer Gutoski reinstatement with back pay, to refuse to recognize the sponsored union, and to post notices (7 N. L. R. B. 385–386).

[1] In the proceedings before the Board and before the court below, American Manufacturing Company of Texas was incorrectly named American Manufacturing Company, Inc. In their answer to the rule to show cause, the present petitioners agreed to the correction of the designation (R. 20).

Thereafter, on October 18, 1938, the parties stipulated and agreed to the entry of a consent decree enforcing the Board's order with certain modifications (R. 10–13). On December 9, 1938, the court below entered a decree requiring the company and its officers, agents, successors, and assigns to cease and desist from the unfair labor practices found by the Board and to reinstate and pay Gutoski $600 in full settlement of the back pay accrued, and in other respects enforcing the Board's order substantially as entered (R. 10–14).

On November 2, 1942, the Board filed a petition in the court below alleging that the company and its officers and agents had failed and refused to comply with and had disobeyed, resisted, and disregarded paragraph 1 (c) of the court's decree.[2] The petition prayed that the court adjudge American Manufacturing Company of Texas, Gourley, its president, and Thompson, assistant to its president, to be in contempt, and take action to make the decree effective (R. 1–16). On November 11,

[2] Paragraph 1 (c) provided that the company, its officers, agents, successors, and assigns should cease and desist "From in any manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining and other mutual aid and protection, as guaranteed in Section 7 of the National Labor Relations Act" (R. 11–12).

1942, the court issued a rule directed to the company and the individuals named to show cause why they should not be adjudged in contempt (R. 17–18). Subsequently the company and the two said officers filed their answer to the Board's petition, together with supporting affidavits (R. 19–58), wherein they admitted, in substance, the commission of most of the acts complained of in the petition (R. 21–23), but denied that the acts were committed with the purpose or effect of interfering with, restraining, or coercing their employees (R. 21, 29), averring to the contrary that they had obeyed the decree (R. 19, 25, 30). They further contended in defense that the acts complained of had no connection with or relation or similarity to the acts which brought about the decree (R. 25).

On January 13, 1943, the court handed down its opinion (R. 58–62) holding that on the basis of the following facts, charged in the petition for contempt and admitted in the answer thereto, the company and its two officers were guilty of contempt:[3]

On or about June 1, 1942, shortly after the International Association of Machinists, the union which had filed with the Board the charges leading to the original Board order and decree, initi-

[3] In the following statement the references preceding the semicolon are to the decision of the court (R. 58–62); those following are to the petition for contempt (R. 1–18) and the answer thereto (R. 19–58).

ated a membership campaign, petitioners attached to the time card of each employee the following notice (R. 59, n. 2; 3–4, 21):

TO OUR MEN

> We are proud of the huge job we are attempting to do for our Country.
>
> You men are doing a real job in this effort—you are spending long hours on the job away from your families and favorite relaxations to help us get the job done—your pay is the highest in this section of the country AND YOU ARE NOT FORCED TO PAY A HIGH FEE FOR THE PRIVILEGE OF BEING DICTATED TO BY A BUNCH OF RACKETEERS, WHO SEEM TO HAVE NO INTEREST IN ANYTHING BUT LOAFING AROUND DOING NOTHING AND SUCKING MONEY OUT OF HONEST WORKING MEN.
>
> We believe you are interested in seeing and helping your Country win the war—in doing your part for your Government in this critical time. We believe you are happy working to this end and THAT YOU ARE TOO BUSY DOING SOMETHING WORTH WHILE TO HAVE ANY TIME TO FOOL AROUND WITH ANYONE WHO ATTEMPTS TO GET YOU OFF OF THIS TRACK.
>
> EVERY MINUTE COUNTS.
>
> THE MANAGEMENT.

Thereafter, petitioners caused the letter set forth in the margin,[4] signed by President Gourley, to

[4] To Our Employees:

I am advised that a letter was sent earlier today stressing the big job we have—the big part you are playing in it—and

be posted on some of the company's bulletin boards at its Fort Worth plant (R. 60, n. 3; 4, 15–16, 21).[5] On or about June 15, 1942, petitioners prepared and posted on every bulletin board in the Fort Worth plant notices containing a copy of the check in the amount of $600 paid

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you were asked to be careful to allow nothing to get you "off the track."

Word has just reached us that some of our men misunderstood or "jumped to the conclusion" that the remarks were aimed at Unions, employees' organizations, etc.

Any man in our employ has the right to join with or organize with others for his and their welfare. We are not legally allowed and do not interfere with the rights of our men under the Wagner Act or any other—just as, being a so-called "open shop" we do not require a man to join any Union, company, or otherwise.

I don't see how any men could have got a wrong slant on the letter. The language was strong for it often does get that way when people start thinking or talking of the many strong forces that are at work to "bog down" our efforts to help our Government win this war. Our work is confidential. We are all constantly reminded to stay on the job and keep our mouths closed.

If you don't "stay on the track"—work hard as you can now—before it is too late—you will have a dictator and a merciless one—he will exact fees beyond your human ability to pay—call him a Dictator, Duce, or just plain Racketeer, it is all the same, a racket—The World's biggest racket in all history.

IT IS LATE, BUT NOT TOO LATE—EVERY MINUTE COUNTS.

AMERICAN MANUFACTURING COMPANY OF TEXAS.
(Signed) W. J. GOURLEY (R. 15–16).

[5] About the same time Foreman Lott advised some of the men in his department that it was "not necessary" to belong to any union or organization in order to work for the company, that the plant had operated for a long time without being a closed shop (R. 6–7, 23, 33).

to Gutoski, stating that he had received only this amount in back pay under the court's decree, but that he would have received over $2,000 if he had continued working for the company instead of listening to union officials' "impossible promises";[6] stating that it was not necessary to belong to a union to work for petitioners, or to pay $50 for the privilege of working "until another $50 sucker comes along;" and making further derogatory references to union organizers as "racketeers" (R. 60–61; 5, 22).[7]

After the issuance of the court's opinion finding them in contempt (R. 58–62), petitioners filed a petition for rehearing (R. 63–67), which the court denied on February 12, 1943 (R. 68). On February 15, 1943, the court entered its decree adjudging petitioners in contempt and ordering that they purge themselves by attaching to each employee's time card and posting on all bulletin boards, notices advising the employees (1) that the com-

[6] While Section 2 (b) of the Board's order provided that the company "make whole John J. Gutoski for any loss of pay he has suffered by reason of his discharge," deducting his interim earnings (7 N. L. R. B. 385), this amount was liquidated in the stipulation for the consent decree, which provided in paragraph 2 (b) of the order that the company would "pay to John J. Gutoski and the latter agrees to receive the sum of $600 in full settlement of any and all back pay accrued and due to the said individual by virtue of Section 2 (b) of the aforesaid Order of the Board" (R. 12).

[7] Barney, petitioners' plant superintendent, refused to remove this notice from the company's bulletin board, although requested to do so by two employees (R. 7, 23).

pany, Gourley, its president, and Thompson, assistant to the president, thereby retracted and disavowed the statements made to the employees in the notices posted and distributed in June 1942; (2) that petitioners would not thereafter concern themselves, or molest the employees, or seek to influence them, in the matter of whether they should join, remain members of, or be active in a labor union; that the employees are free to join the International Association of Machinists or any other union; that petitioners would not discriminate against employees or treat them less favorably because they are members of a union; and that such membership or activity would not be considered as a reflection on their patriotism or their loyalty as workers; and (3) that petitioners had instructed their supervisors and foremen to maintain strict neutrality concerning union matters and that they would not molest or seek to influence the employees in regard to union membership or activities (R. 68–70). The decree further ordered that petitioners pay costs and file proof of compliance with the order (R. 69).

Subsequently petitioners moved the court for a stay of enforcement of its decree adjudging them in contempt (R. 71–72), and the Board filed an opposition to such motion (R. 72–74). On February 25, 1943, the court below granted a stay of execution and enforcement of its decree pending the application of petitioners for a writ of certiorari, which was filed on March 25, 1943 (R. 75).

ARGUMENT

1. The first contention urged by petitioners, which rests on an alleged conflict with *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, is untenable. The *Express* case was concerned solely with the breadth of the injunctive order to remedy the limited unfair labor practices found, not with the issue of punishment for violating the clear terms of a consent decree.[8] The supposed conflict with certain language used by this Court in the *Express* case is based on the assumption that the acts which the court below held to be contemptuous "had no connection with, relation to or similarity to the unfair labor practices found in the original case" (Pet. 9). This assumption is wholly incorrect. The original unfair labor practices were acts by which the company restrained its employees from joining the International Association of Machinists (7 N. L. R. B. 383–384). The acts held contemptuous were, as the court below held (R. 61–62), intended to restrain employees from joining that same union. In the original unfair labor practices as well as in the contemptuous acts, the same officers and agents

[8] As the court below pointed out (R. 61), petitioners may not now complain of the breadth of the original decree, having consented to it and permitted it to become final. See *Oriel* v. *Russell*, 278 U. S. 358; *Swift & Co.* v. *United States*, 276 U. S. 311, 327; *United States ex rel. Emanuel* v. *Jaeger*, 117 F. (2d) 483, 487 (C. C. A. 2). Therefore they must abide by its terms and they may not attack it collaterally, as in enforcement proceedings.

of the company, namely, Gourley and Thompson, were the active offenders (R. 2–6, 60, 7 N. L. R. B. 378–383). In both, the interference was accomplished by posting notices on the bulletin boards of the plant indicating "hostility to outside unions" (R. 59–62, 7 N. L. R. B. 381). Similarly, Gourley's gratuitous statements in 1937 that "a person was foolish to pay $3 a month to a union for the privilege of working" (7 N. L. R. B. 380–381) are of a piece with the contemptuous June 1, 1942, notice that the employees "are not forced to pay a high fee for the privilege of being dictated to by a bunch of racketeers" (R. 3) and the notice of June 15 that it was unnecessary to belong to a union to work for the company or to pay $50.00 for the privilege of working (R. 5). The management's disparagement of the remedy afforded Gutoski under the court's decree, conduct found by the court below to be contemptuous (R. 5, 60–61), was closely related to and connected with his discriminatory discharge, which the Board had found to be a violation of Section 8 (3) of the Act (7 N. L. R. B. 381–383). Hence, petitioners' contention that the contemptuous conduct differed materially from that forming the basis for the original decree is contradicted by the record. Moreover, since the contumacious acts "bear some resemblance" to the acts which constituted the original unfair labor practices, no possible conflict exists between the decision below and *National Labor Relations Board* v. *Express Pub. Co., supra,*

in which, at p. 437, this Court agreed that a court decree enforcing a Board order could properly prohibit future acts which "bear some resemblance" to the original unfair labor practices.

It is apparent, therefore, that the decree is not being applied in the instant contempt proceeding so as to be questionable under the *Express Publishing Co.* decision.

2. Petitioners' second contention, based on *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, is that the notices were not themselves coercive and that no background is shown which causes them to become coercive. This contention is, we submit, without merit.

In holding that the notices were on their face contemptuous the court below said (R. 61):

> Indeed, the attempt to explain away the apparent purpose and natural effect of the language used in the notices, which though designedly equivocal is yet plain enough, is the veriest kind of quibbling. * * *

This conclusion is fully supported by the facts.

Petitioners' advice to their employees in the June 1 notice that they were not "forced to pay a high fee for the privilege of being dictated to by a bunch of racketeers, who seem to have no interest in anything but loafing around doing nothing and sucking money out of honest working men," and warning to them not to "fool around with anyone who attempts to get you off

of this track" (of winning the war) (*supra*, p. 6), constituted interference with the right to complete freedom in organizational activities, of a sort which has been uniformly and repeatedly found to be violative of Section 8 (1) of the Act. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 518; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 78; *National Labor Relations Board* v. *Auburn Foundry, Inc.*, 119 F. (2d) 331, 335 (C. C. A. 7); *National Labor Relations Board* v. *Federbush Co.*, 121 F. (2d) 954, 955 (C. C. A. 2); *National Labor Relations Board* v. *West Texas Utilities Co.*, 119 F. (2d) 683, 684 (C. C. A. 5). It was therefore contempt of the court's decree.

Gourley's letter (*supra*, pp. 6–7), although purportedly seeking to offset the fact that some of the employees "jumped to the conclusion" that the remarks were directed at "Unions, employees' organizations, etc.," contained the additional assurance that "being a so-called 'open shop' we do not require a man to join any Union, company or otherwise." Foreman Lott's statement (*supra*, p. 7) to the same effect, further emphasized this negative aspect of the organizational privileges of the employees. Any doubts as to the company's antiunion intent in the first two notices was completely dispelled by the subsequent notice which cautioned against paying $50 for the privilege of working "until another $50 sucker comes along" (*supra*, p. 8). It is well settled that gratuitous

information to employees from the management that membership in a union is not required, may be viewed as employer interference within the meaning of Section 8 (1),[9] hence likewise violative of the injunction.

The action of the company in posting the notice disparaging the remedy of back pay for Gutoski and referring to the "impossible promises" of the union officials (*supra,* p. 8) was interference of the plainest sort, since it could only indicate to the employees that, notwithstanding the payment the company was obliged to make under the consent decree, Gutoski had lost more than he had gained by his union activities. Thus, the notices presented to the court as violative of its decree were plainly the very interference, restraint and coercion from which the decree required petitioners to cease and desist and compelled the court to find, as it did, that "It is quite clear then that the [petitioners] are in contempt of the decree of this court and that they must be so adjudged" (R. 62).

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[9] *Corning Glass Works* v. *National Labor Relations Board*, 118 F. (2d) 625, 628 (C. C. A. 2); *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221, 223 (C. C. A. 3), certiorari denied, 311 U. S. 705; *National Labor Relations Board* v. *General Motors Corp.*, 116 F. (2d) 306, 309 (C. C. A. 7); *North Whittier Heights Citrus Assn.* v. *National Labor Relations Board*, 109 F. (2d) 76, 78 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Goshen Rubber & Mfg. Co.*, 110 F. (2d) 432, 434 (C. C. A. 7); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 591 (C. C. A. 7).

The conduct set forth above is on its face such clear and unambiguous interference, restraint, and coercion in violation of Section 8 (1) of the Act under established law as to distinguish it readily from the isolated "utterances * * * separated from their background" which this Court felt could not be "raised * * * to the stature of coercion" except "by reliance on the surrounding circumstances" in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479.

Moreover, another act of petitioners provides a background which gives additional significance to the notices. Although two employees requested the company's plant superintendent to remove from the bulletin board the notice disparaging Gutoski's back-pay award and pointing out his financial loss as a result of espousing the union's cause, the notice was not removed. This refusal shows that the notices were in fact designed to interfere with the union campaign in the plant. Thus the record shows an integrated and consistent pattern of interference totally lacking in ambiguity, which properly reflected to the court below the very "imponderable subtleties at work" to which this Court referred in the *Virginia Electric & Power* case (*supra*, at p. 479). This Court did not hold in that case that the First Amendment guarantees the right to make spoken and written statements which coerce employees, and coercive

conduct cannot be permitted under the guise of free speech. See *National Labor Relations Board* v. *Chicago Apparatus Co.*, 116 F. (2d) 753, 756–757 (C. C. A. 7). Contentions similar to petitioners' made in recent petitions for certiorari have not been accepted by this Court. See *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624 (C. C. A. 9), certiorari denied, April 19, 1943, No. 758, this Term; *North Electric Mfg. Co.* v. *National Labor Relations Board*, 123 F. (2d) 887 (C. C. A. 6), certiorari denied, 315 U. S. 818; *Norristown Box Co.* v. *National Labor Relations Board*, 124 F. (2d) 429 (C. C. A. 3), certiorari denied, 316 U. S. 667; *National Labor Relations Board* v. *Elkland Leather Co.*, 114 F. (2d) 221 (C. C. A. 3), certiorari denied, 311 U. S. 705.

3. Petitioners' third contention, that the court below lacks power to require petitioners to post and distribute appropriate notices as a condition of purging themselves of contempt, was at no time raised in the court below, although petitioners had full opportunity to raise it in their petition for rehearing (R. 63–67). It therefore does not properly afford a basis for review. Cf. *Helvering* v. *Wood*, 309 U. S. 344.

However, even if this question were properly presented, it is without merit. The power of the court below to prescribe such a method of purgation is settled by numerous decisions of this

Court and of other federal courts.[10] There are no conflicting decisions.

Petitioners contend that since Section 268 of the Judicial Code (28 U. S. C. 385) prescribes the only "punishment" permitted for contempt of a circuit court of appeals decree, the court was without power to require of petitioners any act but the payment of a fine limited to the expenses incurred by the Board in enforcement (Pet. 10, 14, 23). This contention confuses conditions of purgation with "punishment." The procedure normally followed in a proceeding for civil contempt such as this,[11] where the primary objective is to secure a restoration of the *status quo* disrupted by the contempt, is for the court to specify acts of purgation designed to accomplish that end.[12] Punishment is

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[10] See for example *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441–442; *Texas & N. O. R. R. Co.* v. *Brotherhood of Ry. Clerks*, 33 F. (2d) 13, 17 (C. C. A. 5), affirmed, 281 U. S. 548; *United States* v. *Craig*, 279 Fed. 900, 907 (S. D. N. Y.), habeas corpus denied, *Craig* v. *Hecht*, 263 U. S. 255; *In re Swan*, 150 U. S. 637, 653; *In re Delgado*, 140 U. S. 586.

[11] See *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. (2d) 725, 727 (C. C. A. 5); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 108 F. (2d) 188, 189 (C. C. A. 9); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. (2d) 302, 305 (C. C. A.); *Waterman Steamship Corp.* v. *National Labor Relations Board*, 119 F. (2d) 760, 762 (C. C. A. 5); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 130 F. (2d) 765, 771 (C. C. A. 1).

[12] See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Texas & N. O. R. R. Co.* v. *Brotherhood of Ry. Clerks*,

normally resorted to only when the contemnor refuses to purge himself. The procedure adopted herein follows the uniform practice of the courts in Labor Board cases, where employers have been ordered to purge themselves by compliance with the decree and by submission of proof thereof.[13]

Moreover, the posting of notices by an employer is an established method of restoring the *status quo* by dissipating the effects of interference, restraint,

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33 F. (2d) 13, 17 (C. C. A. 5), affirmed, 281 U. S. 548; *In re Farkas* (E. D. N. Y.) 204 Fed. 343, 345; cf. Rapalje, *A Treatise on Contempt*, N. Y. 1890, pp. 191, 192. The *Gompers* case does not hold, as petitioners assert (Pet. 7, 23), that the only valid condition of purgation is the payment of money. On the contrary, this Court there recognized that conditions of purgation may include such acts as "to surrender property" or "to make a conveyance" (221 U. S. at 442).

[13] See e. g., *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board*, No. 20297, August 11, 1942, 11 L. R. R. 28 (C. C. A. 10); *National Labor Relations Board* v. *Rath Packing Co.*, 130 F. (2d) 540, 543 (C. C. A. 8); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 130 F. (2d) 765, 772 (C. C. A. 1); *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. (2d) 919, 937 (C. C. A. 2); *National Labor Relations Board* v. *Pearlstone Co.*, 7 L. R. R. 480, 480–481 (C. C. A. 8); *National Labor Relations Board* v. *Schreiber Milling & Grain Co.*, decided March 16, 1943 (C. C. A. 8). In *National Labor Relations Board* v. *Lightner Publishing Co.*, 128 F. (2d) 237, 241 (C. C. A. 7) the employer was instructed to purge himself by complying with the decree, paying costs, and submitting proof thereof in 10 days or be imprisoned. Likewise in *National Labor Relations Board* v. *Tidewater Iron and Steel Co., Inc.*, 2 Labor Cases, 652, 653 (C. C. A. 3) March 12, 1940, the court ordered the respondents to comply with the decree in 30 days or then be subject to fine or imprisonment.

and coercion which violate Section 8 (1) of the Act.[14]

4. Petitioners' fourth contention erroneously assumes that there is no "showing of the extent or manner in which these individuals (Gourley and Thompson) participated in the alleged contemptuous acts" (Pet. 10). Although the petition for the rule to show cause asked that it be directed to Gourley and Thompson, as well as the company (R. 1), and although the rule was so directed (R. 17), petitioners did not question, either in their answer or in the supporting affidavit signed by both these individuals (R. 32), the propriety of holding these individuals, if in fact the acts alleged were contemptuous. This issue was raised for the first time in the petition for rehearing below (R. 6), although full opportunity existed to raise it before. Petitioner may not predicate error on new matter thus raised for the first time in its petition for rehearing. Cf. *Independent Wireless Telegraph Co.* v. *Radio Corporation of America,* 270 U. S. 84.

Moreover, the record connects both individuals with the contemptuous acts. The original decree runs against the officers and agents of the company, as well as against the company itself (R.

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[14] *National Labor Relations Board* v. *Express Pub. Co.*, 312 U. S. 426, 438; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 263, 268; cf. *National Labor Relations Board* v. *Ford Motor Co.*, 119 F. (2d) 326, 328, note 2, 331 (C. C. A. 5).

11).[15] The following facts were alleged and admitted: Gourley and Thompson were president of the company and assistant to the president, respectively (R. 2, 20); both men had knowledge of the contents of the decree (R. 2–3, 20); "Respondents" (petitioners herein) caused the notice of June 1, 1942, to be attached to the time cards of the employees (R. 3, 21); Gourley signed the letter (Ex. 2, R. 15, 16) the posting of which was one act of contempt (R. 15, 21); Thompson refused to permit the Board to see a copy of the notice regarding the Gutoski back pay award and on a later occasion informed the Board that no copies of that notice were any longer in existence (R. 5–6, 22). Thus both individuals are shown to have participated in or to have been connected with the contemptuous acts.

5. A final contention, in reliance on *National Labor Relations Board* v. *Pacific Greyhound Lines,* 106 F. (2d) 867 (C. C. A. 9), is that the consent decree lost some of its effectiveness through the passage of time. However, the cited

[15] Corporate officers and agents have frequently been held in contempt of similar decrees. See *National Labor Relations Board* v. *Lightner Publishing Co.*, 128 F. (2d) 237, 241 (C. C. A. 7); *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. (2d) 302, 304 (C. C. A. 2); *National Labor Relations Board* v. *Boss Mfg. Co.*, 118 F. (2d) 187, 188, 189 (C. C. A. 7); *National Labor Relations Board* v. *Pearlstone Co.*, 7 L. R. R. Man. 588, 589 (C. C. A. 8), 3 Labor Cases, Par. 60, 225; *National Labor Relations Board* v. *Tidewater Iron and Steel Co.*, 2 Labor Cases, 652, 653 (C. C. A. 3). See also *Wilson* v. *United States*, 221 U. S. 361, 376.

case was a decision on particular facts, among which the passage of time was but a single factor; in fact, the opinion expressly states (*ibid.* at p. 869) that "the time element here is not the controlling factor * * *."[16]

CONCLUSION

The decision below, finding petitioners in contempt of the court's decree, is correct, and presents no conflict in the decisions nor any questions warranting review. The petition should therefore be denied.

Respectfully submitted.

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APRIL 1943.

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[16] See discussion of the case in *The Scope of NLRB Cease and Desist Orders: Contempt Proceedings Against the Employer*, 53 Harv. L. Rev. 472, 478.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in

any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

U. S. GOVERNMENT PRINTING OFFICE: 1943

No. 852

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

AMERICAN MANUFACTURING COMPANY OF TEXAS, W. J. GOURLEY, AND W. H. THOMPSON, PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF AND WRITTEN ARGUMENT IN REPLY TO OPPOSITION BRIEF

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To Said Honorable Court:

The opposition brief filed for the National Labor Relations Board requires a reply. The argument in the brief is divided into five parts, dealing with the five questions which are raised.

1.

Respondent first argues that there is no conflict with the Express Publishing Company case, 312 U. S. 426. Respondent thereupon attempts to show that there was a similarity between the notices issued in June, 1942,

and those practices which were involved in the 1938 case. Respondent, by this argument, disinherits the Circuit Court's decision. The Circuit Court in the immediate case, did not find that there was any relationship, connection with or similarity between the two practices, but rather decided as a matter of law that there was no necessity for any such similarity, connection, or relation. Respondent makes no effort to sustain such ruling of the Circuit Court, and by indirection at least, admits that the Circuit Court erred.

It can be noted with much interest that in the original Petition For a Rule to Show Cause which was filed with the Circuit Court in November, 1942, the N. L. R. B. did not allege that the acts which occurred in June, 1942, had any relation to, connection with or similarity to the acts and practices which the decree of December 9th, 1938 dealt with. The record as made in the Circuit Court in the contempt proceedings failed to show any such relationship, connection or similarity.

The decision of the Circuit Court in the immediate case is clearly in conflict with the Express Publishing Company decision. Necessarily the adjudgment of contempt is erroneous and should be reversed. It should also be remembered that if the Circuit Court's decision is permitted to stand, it will be precedent as to all future utterances and speech of petitioners. In other words, anything which any officer or employee of American Manfacturing Company might say in the future, whether the same was similar to, related to or connected with what had taken place in 1937 and 38, could be found by the Circuit Court to be violative of

its prior decree and the person making the utterance could be punished for contempt.

2.

In trying to show that there is no conflict between the Circuit Court's decision in the immediate case and the Virginia Electric & Power case, respondent once again departs from the Circuit Court's opinion and goes far beyond what the Circuit Court held. The decision of the Circuit Court in the immediate case is based solely and exclusively on the June notices. The Circuit Court completely ignored the Virginia Electric & Power case. Respondent now attempts to supply the "background" which the Virginia Electric & Power case requires, but which the Circuit Court in the immediate case did not require. The record in this case as made by the Petition For a Rule and by the answer clearly shows that there was no actual interference, restraint or coercion.

In a very recent case, the Circuit Court of Appeals for the Second Circuit, has made a most instructive analysis of the Virginia Electric & Power case. This case entitled N. L. R. B. vs. American Tube Bending Company, opinion dated April 5th, 1943, has not been printed but probably will be by the time this matter is considered. In this case, just before the employees were to vote whether they would go union or non-union, the President of the company issued a letter to all of the employees. This letter, among other things, advised that the company was paying high wages. It went on to ask the men

> "to what kind of leadership are you going to entrust your future with the company? Is it unselfish or is it not? Is it interested in your personal individual welfare, or is it self-seeking? On the basis of its past record, is it open and above board and dependable, or don't you know?"

In a speech delivered to the employees, just before the election, the President said among other things,

> "You have to ask yourself why it is that total strangers, all of a sudden, become so interested in your welfare? Who are they? What have they done? What more can they do for you than you have already done for yourself? You have to ask yourself whether the management of the company that built this factory, that bought the material, that bought the machinery, and provided the job, you have to ask yourself, I say, whether or not this management is best for you in the long run."

It must be remembered that in the Virginia Electric and in the American Tube Bending case, the Courts were called upon to sustain a finding of facts which had already been made, and hence all intendments and presumptions were indulged in favor of the validity of the findings. In our immediate case however it was the burden of the N. L. R. B. to prove by a preponderance of the evidence that the contemptuous acts had taken place. Obviously it would take a greater quantum of proof and would take proof of a more decisive nature, to prove a charge of contempt in an original proceeding than it would to sustain a finding of a unfair labor practice already made by the Labor Board. In the Petition For Rule to Show Cause

in the immediate case, the petitioner set out the notices which were circulated in June, 1942, and it made the allegations (which were purely conclusions) that there had been an interference, restraint and coercion. In the answer filed in the Circuit Court, these petitioners (as respondents) denied that there had been any such interference, restraint or coercion and then plead concrete facts showing that there had in actuality been no such interference, restraint or coercion. No testimony was adduced in this contempt proceeding. It was decided on the basis of the petition and the answer. It is clear that the Circuit Court decided the case on the basis of inferences, which were drawn from the petition, and not on the basis of any established facts.

There is difference in language only, as between the utterances involved in the Virginia case and the American Tube Bending case, on the one hand, and those involved in the immediate case. The following ruling made in the American Tube Bending case is equally applicable to the immediate case, where the court, after remarking that the company did not conceal its preference for no union whatever, said:

> "But there was no intimation of reprisal against those who thought otherwise. If there was a basis for finding that such a presentation of the employer's side might be a covert threat to the recalcitrant, there was as much basis in the Virginia case."

Is there such a difference in the wording of the notices in the immediate case, and the wording used in the Virginia case and the American Tube Bending

case, that this Court can say that such notices in themselves established, by a preponderance of the evidence, an interference, restraint and coercion, while at the same time adhering to its ruling in the Virginia case, that there was no such interference, restraint or coercion even with intendments indulged in favor of the sufficiency of the Board's finding.

3.

Respondent argues that the question as to the method of purge as handed down by the Circuit Court, was not properly raised in such Court, and therefore cannot be made a basis for review. The case of Helvering v. Wood cited for comparison is not in point. With reference to the argument that no complaint was made in the petition for rehearing filed in the Circuit Court, an examination of the record will show that the petition for rehearing was filed as required by the Circuit Court rules, prior to the time that the Circuit Court entered its formal decree in the case. It was not until such formal decree was entered that these petitioners knew that the Circuit Court desired them to post the notices and do these other things by way of purge. The formal decree of the Circuit Court outlining the conditions of purge, is certainly a subject for review by this Honorable Supreme Court.

Respondent does not answer the questions posed in the Petition for a Writ of Certiorari, as to whether the Circuit Court can provide a method of purge and as to the nature of purge which the Circuit Court is authorized to impose.

4.

Respondent states that error cannot be predicated on the question of holding the individuals in contempt, because this matter was raised in the petition for rehearing the first time. It should be remembered that this proceeding was begun as an original proceeding for contempt in the Circuit Court, and there was no necessity for any assignment of error in the contempt proceedings in the Circuit Court. The only question is whether the record as made in the Circuit Court justified the Court's holding the individuals to be in contempt. We submit that it did not.

5.

The argument which petitioners made on the basis of the Pacific Greyhound case is in part cumulative of the argument made under the Express Publishing Company case. It is not argued that the passage of time will in itself destroy a decree. We have said and still say that the passage of time is an element which must be considered in determining whether a prior injunction has been violated. The Circuit Court failed to consider such element, and error is properly assigned to this failure.

Wherefore, petitioners respectfully submit that their petition for review on writ of certiorari should be granted.

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